IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 748 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

HONOURABLE MS.JUSTICE H.N.DEVANI

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

==========

SHANABHAI CHANDUBHAI VASAVA - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

==========

Appearance :
MR G RAMAKRISHNAN for Appellant(s) : 1,
MR KP RAVAL, LD.APP for Opponent(s) : 1,
==========

CORAM : HONOURABLE MR.JUSTICE C.K.BUCH
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 22/03/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. Heard Mr.G.Ramakrishnan, learned counsel

appearing for the appellant-orig.accused and Mr.K.P.Raval, learned Additional Public Prosecutor, on behalf of the respondent-State.

2. The appellant-orig.accused has challenged the legality and validity of the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Bharuch, in Sessions Case No.101 of 1998, whereby the learned trial Judge has held the appellant herein guilty for the offence punishable under Section 376 of the Indian Penal Code. Recording conviction, the learned trial Judge has ordered that the appellant shall undergo rigorous imprisonment for a period of 10 years and also to pay a fine of Rs.500/- and in the event of default in paying the amount of fine, shall undergo rigorous imprisonment for further three months.

3. Mr.G.Ramakrishnan, learned counsel appearing for the appellant, has taken us through the nature of evidence led by prosecution and the reasons

assigned by the learned trial Judge for recording conviction and passing order of sentence. The said order is assailed mainly on following three grounds :

(i) The finding recorded by the learned trial Judge is erroneous because the alternative probability emerging from record from the nature of evidence led by the appellant has been ignored by the learned trial Judge and the appellant could have been given benefit of doubt.

(ii) The second point placed before us is that the prosecution is placed at the instance of one Surendrasinh, who had inimical terms with the appellant as the appellant and his father had serious disputes about payments

with him as they were the agricultural labourers when they were working in the field of Surendrasinh. As per the case of the prosecution, Ranuben-mother of the victim girl-Ganga was, at the relevant point of time, working in the field of Surendrasinh and when it was found that minor victim-Ganga has received injuries in her vaginal part, the said Surendrasinh concocted the story and implicated the accused in a serious crime like rape. Considering the nature of medical evidence led by the prosecution and the inimical terms between the accused and the said Surendrasinh, it was possible for the learned trial Judge to give benefit of doubt to the appellant and the appellant ought not have been held guilty.

(iii) The third argument is of the alternative nature and it is argued that if this Court finds that the appellant is guilty of the offence, the punishment imposed by the learned trial Judge should be held to be unnecessarily harsh as on the date of the alleged incident the appellant was of about 16 to 17 years of age. The appellant is a rustic young boy and, therefore, keeping some reformative eye on the appellant and in the background of the fact that he is from the Scheduled Tribes category and resident of a remote village of one of the talukas of District Bharuch, the minimum sentence prescribed for the offence punishable under Section 376 of the Indian Penal Code could have been imposed but it

appears that the learned trial Judge while imposing the punishment and introducing severity in the punishment has failed to consider this aspect. So this Court at least should reduce the punishment imposed by the learned trial Judge by altering and modifying the same to minimum i.e. 7 years.

4. Mr.K.P. Raval, learned Additional Public Prosecutor, has resisted all the three submissions and has taken us through the reasons assigned by the learned trial Judge for recording conviction and passing sentence. According to Mr.K.P. Raval, the judgment and order under challenge is based on sound reasons. The weak intellectual level of victim Ganga has been exploited. There is sufficient evidence that the victim Ganga was induced by showing and thereafter by giving a currency note of denomination of Rs.2/- and she was taken to the

field where there was standing crop of sugarcane. The appellant was of 16 to 17 years of age i.e. of matured age, and he has committed the heinous crime in question. If the evidence of victim Ganga, Ranuben-mother of victim and Niruben-maternal aunt of victim is considered, it will not be possible for this Court to infer contrary to the finding recorded by the learned trial Judge.

5. For appreciating this aspect, we would like to have a look on the facts placed by the learned trial Judge and nature of evidence placed by the prosecution.

6. It is the case of the prosecution that on 27th March, 1998, minor victim Ganga, who is intellectually weak, when had gone to take bath on a small canal passing through the agricultural fields of village Digas, Tal.Hansot, the appellant approached her and induced her to come with him. The victim Ganga

was given currency note of denomination of Rs.2/-. The victim Ganga was taken to the field where crop of sugarcane was standing and at that place minor Ganga was raped by the appellant. Because of pain and other injuries which were sustained by her, she was crying. Listening her cry, Niruben-maternal aunt of victim Ganga, who was working in the nearby area, reached to the spot and she realized the situation and hence, took the minor victim Ganga with her. Niruben found that sexual offence has been committed on the victim Ganga and, therefore, Niruben sent a call to Ranuben-mother of the victim girl at the place where she was working. At the relevant point of time, Ranuben-mother of the victim was working at the residential premises of the said Surendrasinh, who is one of the panchas in one of the panchnamas drawn in the case. The story was unfolded before Ranuben-mother of the victim Ganga by Niruben and victim herself and, thereafter, with the help and assistance of the said Surendrasinh, the complaint in question

came to be filed and the victim Ganga was thereafter taken to hospital for treatment and examination. The Medical Officer of Primary Health Centre, Hansot, examined the victim Ganga and treated her. Thereafter, she was sent to further treatment to Civil Hospital, Bharuch. The Civil Hospital, Bharuch, was also requested to assess the age of minor victim girl Ganga. Thereafter, the appellant was arrested and he was also examined by the doctor. The clothes of victim Ganga put on by her at the time of unfortunate event, etc. were seized under the panchnama along with other articles and they were sent for analysis to the Forensic Science Laboratory. The appellant, by the time on completion of the basic investigation, was chargesheeted by the police and ultimately, tried and convicted.

7. To prove the offending act of rape, the prosecution has examined victim Ganga vide Ex.24; PW-3-Niruben-maternal aunt of victim

Ganga vide Ex.11 and PW-3-Ranuben, mother of the victim Ganga vide Ex.9. The second set of evidence is in the nature of opinion expressed by the experts i.e. Medical evidence, which has been considered by the learned trial Judge. The witness Dr.Rashmikant Chimanlal Mehta-PW-1, examined vide Ex.5, who has issued certificate Ex.6 dated 02nd April, 1998, has produced papers of treatment and xerox copy of the hospital record of Civil Hospital, Bharuch. The doctor, who had examined the victim Ganga initially i.e. Dr.Omkar Sitaram Chaudhary, has stated the facts in his deposition Ex.60 as reflected in the certificate Ex.18 issued by him. According to Mr.K.P. Raval, learned Additional Public Prosecutor, the opinion of both these doctors clearly support the case of the prosecution that sexual offence is committed against the minor victim Ganga and probabilities placed by the defence's side were not accepted by any of these two experts.

8. The third set of evidence placed by prosecution is procedural in evidence, whereby the pancha witnesses and police witnesses have been examined. In this evidence, we are inclined to refer to one important piece of evidence led by prosecution and that evidence is of recovery of currency note of denomination of Rs.2/- from the victim girl Ganga, when she initially met Niruben. This recovery has been made in presence of panchas. Of course, the panch has not supported the case of the prosecution. However, the learned trial Judge has placed reliance on the evidence of Investigating Officer, wherein the Investigating Officer i.e.Police Sub-Inspector Mr.Sutariya, has categorically stated that the currency note of denomination of Rs.2/- has been recovered during the course of investigation and under the panchnama drawn in presence of panchas. It is true that it is expected that the prosecution should lead convincing evidence when an important article is being seized during the course of investigation.

But it is also settled that in the event of hostility of panchas, the Court can place reliance on the evidence placed by police in certain cases and it is possible to infer that recovery of such article is otherwise genuine and there is no element of concoction. The story of prosecution is consistent qua the use of currency note of denomination of Rs.2/- in inducing the victim Ganga and from record nowhere, it emerges that this theory of inducing the minor victim Ganga by showing her currency note of denomination of Rs.2/- is an afterthought. In this fact situation, it is rightly argued by Mr.K.P. Raval, learned Additional Public Prosecutor, that if this piece of evidence is important piece of evidence appreciating the oral versions of Ranuben and Niruben, then the arguments advanced by the learned counsel appearing for the appellant-orig.accused may not be accepted and, therefore, it is submitted that the stand taken by the appellant is not acceptable and it should be

held that the finding recorded by the learned trial Judge is absolutely legal and it does not suffer from any infirmity.

9. After some deliberations and arguments which have been advanced by Mr.G.Ramakrishnan, he has accepted that the appellant may not press this appeal against the order of conviction recorded by the learned trial Judge; especially when in the panchnama of scene of offence, there is no reference as to the broken stump of sugarcane. The learned trial Judge has rightly appreciated two facts as to the height of the victim Ganga and height of the sugarcane crop, which was standing in the field. There is clear reference of the area where the sugarcane crop was found disturbed and in this background, if the medical evidence is considered to be an important corroborative piece of evidence in support of prosecution witnesses examined, this Court may not disturb the conviction. However, at least this Court should appreciate the third and

alternative argument advanced by him. We have considered the nature of injuries found by the doctor when minor victim Ganga was examined initially on the date of incident and in early hours after injury, which was sustained by her because of the offending act of the appellant. We would like to reproduce the nature of injuries found on the body of the victim girl Ganga, which are as under :

Part :A : Description of injury over body

(i) Abrasion on Rt.side of back.
2cm. X 1cm. Creneting at centre.

(ii) Superfilied scratch on back of Rt.side 5cm. landed to veritable.

(iii) 1cm. X 0.5 cm. Barising a back of Lt.side 7cm. To S3 veritable.

(iv) Mark of teeth bite 1cm. X 0.5cm. on Lt.side of neck 3cm. below the lower mandible.

Part :B : Per Vagina Examination

(i) Vagina swap was socked with blood.

(ii) Thigh could not be separalment due to ineffable pain.

(iii) Blood stain was present of medical side of both thigh.

(iv) Lower part of vagina orifice was torn.

(v) Non headed tear of hyman was visible on spectulam examination.

(vi) Posterior fornik was torn.

10. On careful consideration of the reasons assigned by the learned trial Judge for recording conviction, we are of the view that Mr.G.Ramakrishnan, learned counsel appearing for the appellant, has rightly submitted that this is a case wherein the appellant may not press the appeal against the order of conviction recorded by the learned trial Judge. We, therefore, adopt the reasons assigned by the learned trial Judge without reproducing the same. It is settled law that the Appellate Court

when is inclined to adopt the reasons assigned by the learned trial Judge, it is not required to rewrite the same judgment in different language. So adopting the reasons assigned by the learned trial Judge, we record our satisfaction that the judgment and order conviction recorded by the learned trial Judge is free from any infirmity and based on sound reasons and correct appreciation of evidence.

11. So far as the alternative argument of Mr.G.Ramakrishnan, learned counsel appearing for the appellant, is concerned, we are a bit impressed when we are asked to consider the following aspects :

(i) When the appellant committed the alleged wrong, he was a teenager and also he is a rustic young tribal boy.

(ii) Once this very appellant with his

father was working in the field of Surendrasinh. So it is likely that the victim girl Ganga may be in the contact directly or indirectly with the appellant and she had practically completed about 10 years of age. So the presence of a lonely girl in the agriculture field near water canal must be added to the excitement of a teenager and he committed serious criminal wrong in question. The difference of age of appellant and the victim is comparatively more but the strength of guilty mind requires to be assessed while fixing the quantum of punishment. This is not a case of offender or sex maniac.

(iii) Lack of sex education in schools sometimes leads to such type of

offending acts and the appellant-orig.accused practically appears to be illiterate. So it was possible for the learned trial Judge to consider whether it is possible to impose minimum prescribed punishment for the offence considering the totality of facts and circumstances of the case. It appears that the learned trial Judge has failed in considering this aspect.

(iv) The learned trial Judge has also not considered one important aspect i.e.non-availability of serological report. So it is very likely that while committing the offending act, when the appellant came to know that his wrong has result into serious inside injury in the private part of the girl, he

escaped from the place where the offence was committed. As per the settled legal position, the slightest penetration is a rape and in the present case, it was found that the minor girl has sustained a tear and, therefore, some surgical treatments were also given to the victim Ganga. In this situation, looking to the conduct of the appellant, it is not possible for the Court to infer the appellant committed crime till last or probably the prosecution has not satisfactorily proved that the appellant committed the crime till last. This conduct of the appellant of leaving the place immediately on realization that the minor girl Ganga had sustained serious injuries, tilts the balance in favour of the appellant when it

comes to determination of quantum of punishment. In such or similar cases, the trend of the Court is to impose minimum punishment and, therefore, according to us, the learned trial Judge ought to have imposed rigorous imprisonment for seven years to the appellant. The amount of fine imposed by the learned trial Judge is found adequate. According to us, no interference is required to be made qua the finding in respect of amount of fine. So it would be justified to reduce the substantive sentence from 10 years to 7 years. Of course, Mr.K.P. Raval, learned Additional Public Prosecutor, has resisted the submission made in this regard by Mr.G.Ramakrishnan and it is argued that the Court should not be lenient and there

should be element of deterrence in the punishment imposed but we would like to refer to one decision, of course, the facts are materially different. But it has been held indirectly by the Apex Court that punishment of 7 years imposed by the trial Court to a young boy of 18 years of age is adequate punishment and nothing less than minimum could have been imposed whe it is found that the rape has been committed. In the case of ***State of Rajasthan v/s. Om Prakash, reported in 2002(5) SCC 745***, learned trial Judge has held the accused guilty of the offence punishable under Section 376 of the Indian Penal Code and had imposed punishment of 7 years rigorous imprisonment. The High Court had acquitted the accused. The order of

acquittal recorded by the High Court was assailed before the Apex Court. The Apex Court reversed the order of acquittal recorded by the High Court and confirmed the judgment and order of conviction and sentence passed by the learned Additional District and Sessions Judge. While arguing on behalf of the orig.accused, it was submitted before the Apex Court that the accused had remained in jail for three years and when the matter has been heard for about 13 years, the Apex Court should consider the punishment as of three years and the accused may not be asked to undergo any further period in prison. The Apex Court has not accepted this submission and has held that the punishment imposed by the learned trial Judge of 7 years

is minimum and the accused should undergo the imprisonment for 7 years. In this cited decision, the victim girl was of about 8 years of age. In the case before us, the victim girl on the date of incident was of about 10 years of age. But the accused comparatively is younger by one year in the present case, i.e. of about 17 years.

12. So irrespective of the discussion made by the Apex Court in the cited decision on the point of quantum of sentence, we are of the view that in the present case considering the totality of facts and circumstances of the case and socio-economic background of the parties and circumstances in which the offence has been committed by the appellant, it was possible for the learned trial Judge to impose punishment minimum prescribed for the offence punishable under Section 376 of the Indian Penal Code. The

punishment prescribed for the offence punishable under Section 376(1) of the Indian Penal Code is a four tier proviso. The statute says that the period of sentence should be minimum of 7 years, if the offence is proved. The second tier is of 10 years, which means that the Court if decides to impose punishment for more than 7 years and to the extent of 10 years, then normally it should assign good and convincing reasons as to how the case falls in the category where punishment of more than minimum prescribed period needs to be imposed. The third tier is imposition of punishment for life. In a rape case, when the Court decides to impose life imprisonment then detailed reasonings are required to be given by the learned trial Judge as to how and why the case falls in the category where life imprisonment is required to be imposed.

13. The present case falls under ex-circumstance 'sixthly' of Section 375 of the Indian Penal Code. While dealing with cases under

circumstance 'sixthly', the Court should address itself whether facts placed and/or proved, it remained the technical offence or can be said to be a heinous crime.

14. Fourth and last tier is for imposing less period of punishment than minimum prescribed. For this Court is supposed to give adequate and special reasons. Therefore, the reasons must not be only adequate but also special. Unless the Court is able to say so, there is no scope to award punishment less than minimum or to say that it is reduced to “already undergone”, if such period is less than seven years.

15. So without entering into further discussion, we are of the view that the third and alternative argument advanced by Mr.G.Ramakrishnan should be accepted and the substantive sentence imposed by the learned trial Judge needs to be reduced to 7 years instead of 10 years, in facts and circumstances of the present case.

16. In view of above observations, the present appeal is here partly allowed. The judgment and order convicting the appellant-orig.accused for the offence punishable under Section 376 of the Indian Penal Code is hereby confirmed. However, the order of sentence sentencing the appellant-orig.accused to undergo rigorous imprisonment for 10 years is hereby altered and modified to the extent of 7(seven) years. The appellant-orig.accused is ordered to undergo rigorous imprisonment for 7 (seven) years instead of 10(ten) years. However, the sentence of fine is confirmed. If the appellant-orig.accused has already undergone rigorous imprisonment for 7(seven) years as modified by this Court, he shall be set at liberty forthwith, if not required to be detained in any other case.

(C.K. Buch, J)

(Harsha Devani, J)

Aakar